IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5283

JAMES A. JACKSON,
Petitioner,

vs.

COMMONWEALTH OF VIRGINIA
and
R. ZAHRADNICK, WARDEN,
Respondents.

BRIEF ON THE MERITS IN SUPPORT OF RESPONDENTS SUBMITTED AMICUS CURIAE BY THE STATES OF INDIANA, NEBRASKA, PENNSYLVANIA, UTAH, AND WEST VIRGINIA

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The State of Indiana, by Theodore L. Sendak, Attorney General of Indiana, Donald P. Bogard, Chief Counsel-Staff, and David A. Arthur, Deputy Attorney General, and the states of Nebraska, Pennsylvania, Utah, and West Virginia, by their respective Attorneys General, pursuant to Rule 42 of the Rules of the Supreme Court of the United States, submit their *amicus curiae* brief on the merits in support of the Respondents in the above-entitled cause.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Fourth Circuit and of the United States District Court

for the Eastern District of Virginia are unreported and may be found respectively at pages A30-35 and A25-28 of the Appendix filed by Petitioner.

JURISDICTION

This Court has jurisdiction to review this cause by writ of certiorari pursuant to 28 U.S.C. § 1254(1), and has accepted it for such purposes by granting said writ on December 4, 1978.

CONSENT OF THE PARTIES

The *amicus curiae* brief is filed by the States of Indiana, Nebraska, Pennsylvania, Utah, and West Virginia pursuant to Rule 42 of the Rules of this Court and consent of the parties is not required pursuant to Rule 42(4).

QUESTION PRESENTED

Whether the United States Court of Appeals for the Fourth Circuit (hereafter "Fourth Circuit") is correct in following *Thompson v. City of Louisville,* 362 U.S. 199 (1962), in reviewing, by way of appeal in ***habeas corpus,*** a conviction for first-degree murder.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

INTEREST OF THE AMICUS

The *amici* submit this brief since the question presented by the Petitioner is as vital to them as it is to Virginia and to all States in the Union. Petitioner seeks to have this Court overrule a long line of cases.

This case involves an attempt by Petitioner to obtain reversal of *Thompson* on the grounds that it is in conflict with *In re Winship,* 397 U.S. 358 (1970). Were *Thompson* overruled and another standard of appellate review on the sufficiency of the evidence established, the case load and the work load per case of the Office of the Attorney General of Indiana would increase substantially, as the Attorney General is counsel in all federal *habeas corpus* actions attacking the validity of Indiana convictions. There are currently numerous federal *habeas corpus* actions challenging the sufficiency of the evidence of guilt in convictions pending in Indiana federal courts. Undoubtedly, numerous other actions are contemplated by Indiana prisoners.

If the rule established by *Thompson* were overturned, the standard of review in criminal appeals to the appellate courts of Indiana and all other states could also be affected, thereby throwing doubt upon the finality of state court judgments of conviction.

STATEMENT OF THE CASE

On March 27, 1975, Petitioner James A. Jackson (hereafter "Jackson") was tried by the court upon an indictment for murder. Jackson was found guilty and awarded

a sentence of thirty years in prison. An appeal to the Supreme Court of Virginia resulted in affirmance on February 10, 1976.

Jackson filed his petition for writ of *habeas corpus* on June 18, 1976, alleging, *inter alia*, that the evidence of his malice or premeditation was insufficient. The United States District Court for the Eastern District of Virginia (hereafter "District Court") granted a writ on October 1, 1976, finding no evidence of premeditation. The Commonwealth of Virginia took a timely appeal to the Fourth Circuit. On August 3, 1978, the Fourth Circuit reversed the District Court, finding evidence of each of the elements of first-degree murder.

The petition for writ of certiorari was granted by this Court on December 4, 1978.

STATEMENT OF THE FACTS

The *amici* rely upon the facts as stated by the Commonwealth of Virginia in its Brief on the merits.

ARGUMENT

The Fourth Circuit Is Correct in Following and Applying Thompson v. City of Louisville in Reviewing, by Way of Appeal in Habeas Corpus, a Conviction for First-Degree Murder

This case arises from the reversal on appeal of a district court judgment granting a writ of *habeas corpus*. While applying the standard of *Thompson v. City of Louisville, supra*, two courts reached different conclusions as to the existence of the evidence in the state court record. Jackson argues that the Fourth Circuit erred in applying *Thompson*, and that the court should instead have applied *In re*

Winship, supra. The two cases are not in conflict as they deal with different topics and with different proceedings.

Thompson arose as a direct appeal from a state court. The case establishes a standard for review on appeal, and deals with the burden of production. *Winship* concerns a fact situation set at the trial court level, and deals with the burden of persuasion. The question in *Winship* is not whether the trial court could have found delinquency beyond a reasonable doubt, but whether a preponderance of the evidence is sufficient to sustain an adjudication of delinquency. The set fact situation is that the trial court acknowledged that the proof did not establish guilt beyond a reasonable doubt. *Winship, supra*, at 360. The court had clearly distinguished between preponderance and reasonable doubt. *Id.*, at 367. In *Winship* the explicit holding is:

> . . . that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *Id.*, at 364.

That holding is conveyed to the jury in every set of instructions in every criminal trial, or else those instructions subject the conviction to reversal upon appeal for lessening the burden that the prosecution must bear. See *Cool v. United States*, 409 U.S. 100, 102 (1972). Every judge who sits as trier of fact is bound by the same standard.

Application of the reasonable doubt standard calls for a "fine resolution of conflicting evidence." *Gerstein v. Pugh*, 420 U.S. 103, 121 (1975). The "fine resolution" requires that the trier of fact make a judgment as to the credibility of witnesses as well as to the weight of the evidence. There has not been a development that would allow resolution of the credibility of a witness from the review of a transcript

at the appellate level. Too many factors are involved in that determination that cannot be contained in a transcript: a break in ones voice; a nervous twitch; a hesitancy; the avoidance of eye contact; the manner in which one speaks, holds his head, crosses his legs, or folds his arms, are but a few of the myriad factors legitimately considered by the trier of fact but which never appear in the "cold record."

A trier of fact is entitled to believe or to disbelieve anyone. Such belief or disbelief is not recorded in the short verdict that is required. Still, jury verdicts are sustained even if the jury would have been justified in having a reasonable doubt and even if a judge would have reached a contrary conclusion. *Johnson v. Louisiana,* 406 U.S. 356, 362 (1972). It is assumed that jurors understand and properly carry out their responsibility to conclude beyond a reasonable doubt. *Id.,* at 361-62. In *Johnson,* decided after *Winship,* this Court upheld a Louisiana statute, stating that in a crime punishable only at hard labor, a guilty vote from nine of twelve jurors was constitutionally permissible as a basis for punishment. There is in the present case no basis for assuming that the judge in Virginia hearing Jackson's criminal trial ignored either the Constitution that he is sworn to uphold or the decision in *Winship* that he is bound to follow. There is no basis for assuming that the trial judge in Virginia applied *Thompson* at the trial level, searching for only some evidence of guilty, knowing that if there were any he would be upheld on appeal. He necessarily concluded that the burden of persuasion had been met.

It has long been the rule on appeal that appellate courts do not sit "to weigh the evidence or to determine the credibility of evidence." *Glasser v. United States,* 315 U.S. 60,

80 (1941); *Hamling v. United States,* 418 U.S. 87, 124 (1974), *rehearing denied* 419 U.S. 885. This Court in *Winship* did not weigh the evidence or determine its credibility. The weight and credibility had already been determined by the trial judge and by the statute involved in that case. *Winship, supra,* at 369 (Harlan, J., concurring). Even the dissenting opinions failed to consider weight or credibility. Assuming, as the appellate courts must, that each fact necessary to constitute the crime charged was found to exist through application of the reasonable doubt standard, the courts then look to see only if there is *justification* for the finding. That is the standard embodied in the holding of *Thompson.* Appellate courts look to the facts produced, not to their persuasiveness. If the appellate courts were to assume that the trial courts and juries would not apply and follow a proper standard, triers of fact would have no function except to serve as an audience. That is not the function envisioned either by the Sixth Amendment or by the decisions of this Court.

Appellate courts look only to the facts produced in the trial courts. In *Thompson,* there were no facts produced from which each element of the offense could be inferred. In *United States v. Romano,* 382 U.S. 136 (1966), this Court held that because proof of the ultimate fact rested upon a presumption once the basic fact is proven, and because the ultimate fact did not follow from the basic fact "beyond a reasonable doubt," there was no proof produced as to the ultimate fact. Presumptions established either by statute or by case law are laws and not facts. Appellate courts do not determine weight or credibility of evidence but only review the law in light of superior law and in light of common experience. In *Romano,* had the presumption of ownership from mere presence been instead presence plus some

reliable indicator of ownership, or had the crime been defined as knowingly being present at a still, the outcome would have been different. This Court simply held that there was no fact produced showing possession, the "fact" having arisen from an invalid legal presumption allowing conviction for presence rather than for possession.

On the other hand, if there is some evidence produced, whether conflicting or not, a trier of fact is fully justified in finding that the evidence is credible and is equally justified in finding that it is not credible. A trier of fact may find one small action or statement more persuasive and credible than all of the other evidence combined. If *Thompson* were rejected, it would be necessary for appellate courts to make determinations of persuasiveness and of credibility. The logical (but admittedly extreme) conclusion would be that quantity would prevail over quality in the "fine resolution of conflicting evidence." If the defendant produces three witnesses to say that he is innocent, the prosecution would have to produce four to say that he is guilty and would have to make a showing on the record that each of the four is credible.

Some testimony is inherently suspect. See *e.g., Crawford v. United States*, 212 U.S. 183 (1909). However, even a pathological liar or a convicted perjurer tells the truth at times. If the testimony showing the guilt of the defendant is given by a proven pathological liar, the jury could still be justified in believing him. The appellate courts, and the federal district courts presiding over *habeas corpus* proceedings, cannot view exactly what the original trier of fact viewed.

When there is no evidence produced, obviously the trier of fact erred in being persuaded, or convicted the person

because of some inappropriate reason. Thompson may well have been convicted because of his past conduct. Dick Gregory may well have been convicted because of his stance on integration. See, *Gregory v. City of Chicago*, 394 U.S. 111 (1969). But when there is any evidence at all produced, the determination of the trier of fact that that evidence, however slight, persuades it of defendant's guilt beyond a reasonable doubt, should not only be entitled to deference but to conclusiveness. Otherwise, appellate courts and courts sitting in *habeas corpus* proceedings will necessarily have to make determinations of weight, of credibility and of persuasiveness, and trials and transcripts will then become longer as the prosecution is forced to prove and re-prove facts and to establish and support the credibility of its witnesses *on the record*. This will be required in order to lessen the possibility that at some point in the future a state appellate or a federal court is going to hold that a particular element was not proven because a witness was not shown beyond a reasonable doubt to have been persuasive and credible when the prosecutor knows and the trier of fact determines that there had never been a more credible or persuasive witness who gave more credible testimony and one look at him would have convinced anyone of that fact. In the transcript, however, his words are in the same size and style of type as those of a person who the trier of fact finds to be lying in that very same trial.

In the present case, it would appear that voluntary intoxication under Virginia law is analogous to sudden heat under New York law. Sobriety is not an element of first-degree murder.

> [V]oluntary drunkenness, when interposed as a *defense* to murder will not be allowed to reduce the offense to manslaughter. *Drinkard v. Common-*

> *wealth of Virginia*, 165 Va. 799, 183 S.E. 251, 253 (1936). (Emphasis supplied.)

The Supreme Court of Appeals of Virginia has also held that:

> . . . when a person voluntarily becomes intoxicated and is thereby led to commit a crime, he cannot be allowed to hide behind his own condition as an excuse. *Cody v. Commonwealth of Virginia*, 180 Va. 449, 23 S.E.2d 122, 123 (1942).

Cody was convicted of first-degree murder. It would appear that under Virginia law, voluntary intoxication is in the nature of an affirmative defense. Voluntary intoxication is thus no different from the affirmative defense of insanity. See, *Rivera v. Delaware*, 429 U.S. 877 (1976). In the instant case nothing is presumed against Jackson. *Cf.*, *Mullaney v. Wilbur*, 421 U.S. 684 (1975). Sobriety or drunkenness is not a "crucial factor" separating two crimes with a substantial difference in punishment. *Patterson v. New York*, 432 U.S. 197 (1977) (dissenting opinion of Powell, J.). Unlike presuming malice from an intentional killing, the prosecution in *Jackson* was required to and did produce evidence of a "willful, deliberate, and premeditated killing." Virginia Code Annotated § 18.2-32; *cf.*, *Mullaney, supra*. The proof produced by the Commonwealth is discussed at pages 5 through 7 of the opinion of the Fourth Circuit. The Commonwealth produced evidence and persuaded the trier of fact. Jackson obviously did not persuade the trier of fact that he was too intoxicated to form the requisite *mens rea*. Statements of the defendant are not taken as unquestionably true. If anything, it is the most questionable evidence. It is a choice that the trier of fact is to make.

> The testimony of the defendant in a criminal case is to be considered and weighed by the jury, taking all the evidence into consideration, and giving such weight to the testimony as in their judgment it ought to have. *Wilson v. United States*, 162 U.S. 613, 621 (1895).

It does not add anything that prosecution witnesses acknowledge that Jackson had been drinking. The trier of fact could and did conclude that Jackson's intoxication did not excuse his crime, taking all of the evidence into account.

Unlike the situation in *Thompson*, and contrary to Jackson's argument, there was evidence produced to show premeditation. *Thompson* is not as Jackson reads it. See pp. 12-13 of the Brief for the Petitioner. As a matter of the substantive law of Kentucky, arguing with a policeman is not disorderly conduct, and mere presence is not loitering. Under Jackson's reading of *Thompson*, evidence of *some* element would be enough to meet the Due Process Clause rather than some evidence of *each* element. This is the same standard embodied in Rule 29(a), Federal Rules of Criminal Procedure. "Insufficient" as used in that rule means a modicum of evidence as to each element.

Jackson argues that no rational trier of fact could have found him guilty beyond a reasonable doubt. Even if "the Commonwealth of Virginia recognizes that a mind may be so bewildered from intoxicating beverages as to be entirely incapable of premeditation" (Brief for the Petitioner, p. 20), the trier of fact was not bound to conclude in this case that Jackson was "bewildered" to that degree. A person may be intoxicated to the point where he could be convicted of driving under the influence, but still be capable of comporting his actions to the dictates of law, capable of recognizing right from wrong, and capable of forming intent.

Jackson in his argument overlooks several facts. Jackson and Mrs. Cole argued. Jackson struck Mrs. Cole with the butt of the revolver. Jackson emptied and then reloaded his revolver while his "attacker" watched idly. Mrs. Cole was shot twice, from two different angles.

The Commonwealth has clearly met its burden of production. There is evidence of each element of the crime of murder in the first degree.

CONCLUSION

For the foregoing reasons, the *amici curiae* respectfully urge this Court to affirm the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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